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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-2211

THEODORE R. GOOCH, et al.,

Petitioners,

vs.

SKELLY OIL COMPANY, a corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 5

A. The District Court's Finding of "Excusable Neglect" 6

B. The Reversal of the Trial Court's Finding of "Excusable Neglect" 9

Reasons for Granting the Writ 11

I. Since the Federal Rules Have Been Amended to Permit Extensions of Appeal Time Upon a Showing of Excusable Neglect, the Court of Appeals Did Not Have Jurisdiction to Dismiss the Appeal in the Absence of a Cross Appeal Challenging the Findings and Conclusions of the Trial Court Under Rule 4(a) 11

II. The Decision of the Court of Appeals Conflicts with the History of Rule 4(a) and the Definition of Excusable Neglect Put Forth in the Decisions of Other Courts of Appeals 16

Conclusion 24

Appendix A A1

Appendix B A25

Appendix C A35

Authorities

CASES

Buckley v. *United States*, 382 F.2d 611 (10th Cir. 1967) 18, 21

Cohen v. *Plateau Natural Gas Company*, 303 F.2d 273 (10th Cir. 1962) 18, 19, 21

Conway v. *Pennsylvania Greyhound Lines, Inc.*, 243 F.2d 39 (D.C. Cir. 1957) 22

Dugan v. *Missouri Neon & Plastic Advertising Company*, 472 F.2d 944 (8th Cir. 1973) 23

Grantham v. *Morgan Linen Serv., Inc.*, 426 F.2d 237, 238 (7th Cir. 1970) 15

Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 282, 9 L.Ed.2d 261 16

Lathrop v. *Oklahoma City Housing Authority*, 438 F.2d 914 (10th Cir. 1971) 13, 18, 19

Lieberman v. *Gulf Oil Corporation*, 315 F.2d 403 (2d Cir. 1963) 23

Long v. *Emery*, 383 F.2d 392 (10th Cir. 1967) 17, 18

Maryland Casualty Company v. *Conner*, 382 F.2d 13 (10th Cir. 1967) 17, 20

Nichols-Morris Corporation v. *Morris*, 279 F.2d 81 (2d Cir. 1960) 19, 20

Peoria & P.U.R. Co. v. *United States*, 263 U.S. 527, 68 L.Ed. 427 12

Resnick v. *Lehigh Valley R. Co.*, 11 F.R.D. 76 (S.D.N.Y. 1951) 21, 22

Schacht v. *United States*, 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 12

Thompson v. *Immigration & Naturalization Service*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 16

Torockio v. *Chamberlain Mfg. Co.*, 456 F.2d 1084 (3rd Cir. 1972) 23
United States v. *Mills*, 430 F.2d 526 (8th Cir. 1970) 23
United States v. *Robinson*, 361 U.S. 220, 4 L.Ed.2d 259, 80 S.Ct. 282 ..... 13, 14
United States v. *Wade*, 467 F.2d 1226 (8th Cir. 1972) 23
Wolsohn v. *Hankins*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 16

RULES, TEXTS AND STATUTES

Fed. R. App. P., Rule 4(a) 2, 4, 6, 7, 9, 11, 15, 16, 18, 19, 20
Fed. R. Civ. P., Rule I 3
Fed. R. Civ. P., Rule 61 3
Fed. R. Civ. P., Rule 77(d) 2, 3
Fed. R. Civ. P., Rule 12(h) 11
9 Moore's Federal Practice, 204.02 15
9 Moore's Federal Practice, 204.13 17
28 U.S.C. 1441 15
28 U.S.C. 1332 5
28 U.S.C. 1254(1) 2
28 U.S.C. 2072 12
28 U.S.C.A. §211 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COME NOW Theodore R. Gooch, et al., and petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit dismissing their appeal to that Court on the ground that the United States District Court for the District of Kansas abused its discretion when it permitted them to file their Notice of Appeal more than 30 (but less than 60) days after the judgment of the lower court had become final.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 493 F.2d 366. The District Court's Memorandum of Opinion was not published. These opinions are attached hereto as Appendix A and Appendix B, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1974. A petition for rehearing was denied on June 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals have jurisdiction to dismiss the appeal on the ground that it was not timely filed when no appeal was lodged by the defendant-appellees from the order of the District Court finding excusable neglect under Rule 4(a) of the Federal Rules of Appellate Procedure?

2. Is excusable neglect shown under Rule 4(a) of the Federal Rules of Appellate Procedure when an attorney residing far from the place of trial and occupying a secondary role in both the discovery and the trial of the case assumes that his co-counsel, who resides at the place of trial and is in charge of the conduct of all phases of the litigation including the preparation and filing of pleadings, will receive the same written notice from the Clerk of the District Court which he has received and that the contents of the notice (i.e., that the post trial motions filed on behalf of their clients had been overruled) will cause his co-counsel to proceed with the filing of the Notice of Appeal (as they had previously agreed) but, in fact, his co-counsel did not receive the Clerk's notice and did not, therefore, file the Notice of Appeal within thirty days of the date of such notice?

3. Does Rule 77(d) of the Federal Rules of Civil Procedure require that an attorney responsible for filing a

notice of appeal monitor the activities of the Clerk of the District Court in order to know when his post trial motions have been ruled upon, so that the 30-day appeal time will not run without his knowledge, regardless of whether he actually receives written notice of such ruling from the Clerk?

STATUTES INVOLVED

28 U.S.C.A. §211 provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule I, Fed. R. Civ. P. provides in pertinent part:

"They [the rules] shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 61, Fed. R. Civ. P. provides in pertinent part:

". . . no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 77(d), Fed. R. Civ. P. provides:

"Notice of Orders or Judgments. Immediately upon the entry of an order of judgment the clerk shall serve

a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

Rule 4(a), Fed. R. App. P. provides in pertinent part:

"In a Civil Case . . . the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; . . . . If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed."

* * *

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision has expired. Such an extension may be granted before or after the time prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

STATEMENT OF THE CASE

These consolidated actions were individually filed in the Stevens County District Court in Kansas in the latter part of 1969 and the early part of 1970. The actions were thereupon removed to the Federal District Court for the District of Kansas under 28 U.S.C. 1441 and 28 U.S.C. 1332 upon the petition of the defendants asserting diversity of citizenship and an amount in controversy in each case in excess of $10,000, exclusive of interest and costs.

The plaintiffs are the lessors and the defendants are the lessees under several oil and gas leases on adjoining tracts of real property located in Stevens County, Kansas.

The plaintiffs contend that the defendants intentionally drained oil and gas from beneath their property by means of wells located on adjoining property, thereby entitling them to damages for lost royalties on the value of such oil and gas ($165,000 at the time of the trial) and, further, the cancellation of the leases upon such portions of the property from which the oil and gas had been drained. Plaintiffs also seek punitive damages and attorney fees.

The portions of the leases which the plaintiffs originally sought to cancel had a market value of approximately $225,000 in 1970.

A total of 549 exhibits were admitted at trial. Six experts testified on behalf of the parties. Seven attorneys were present throughout. After finding for the defendants and overruling the plaintiffs' post trial motions, the trial court observed that it was a "difficult" and "voluminous" case with which he had had great "problems"—"there were days when I had all these exhibits in front of me trying to do something. . ." (Appendix C, pp. A35-A37).

Plaintiffs were represented from the outset by two law firms: Fleeson, Gooing, Coulson & Kitch in Wichita, Kansas, and Kramer, Nordling, Nordling & Fay in Hugoton, Kansas. Hugoton is in Stevens County (the location of the leases) and Wichita is where the trial took place. The two cities are approximately 250 miles apart.

The Wichita law firm was responsible for the initiation and conduct of all phases of the litigation. In nearly all of the discovery depositions, plaintiffs were represented exclusively by Robert Cornwell of the Fleeson firm in Wichita. Mr. Cornwell or another member of his firm prepared and filed all pleadings on behalf of plaintiffs. No member of the Hugoton firm appeared during any of the numerous pre-trial hearings and conferences. Mr. Cornwell conducted the examination and cross-examination of all witnesses during the trial and presented all arguments on behalf of plaintiffs with the exception of a portion of the closing argument.

A. The District Court's Finding of "Excusable Neglect"

The extent of Mr. Cornwell's participation in and responsibility for the conduct of the litigation was a matter peculiarly within the knowledge of counsel and the District Court. At the post trial hearing held to determine whether there had been "excusable neglect" under Rule 4(a), the trial court acknowledged that Mr. Cornwell had been lead counsel for the plaintiffs (Appendix C, pp. A36-A37). Counsel for the defendants did not object to this finding or contend otherwise at the hearing because he himself had dealt extensively with plaintiffs' counsel and knew from his own experience that Cornwell had run the lawsuit from the beginning.

The trial court went on to observe that it was understoood by all counsel and the court that the losing party would appeal:

> ". . . but here everything was prepared from the very start in this case with a view that one or the other of you were going to have this case reviewed. You know it and I know it." (Appendix C, p. A39).

This finding was not challenged at the hearing or in the Court of Appeals; after judgment was entered for the defendants, it was perfectly clear to all concerned that Mr. Cornwell was going to file an appeal if his post trial motions were overruled. There was no need for him to discuss the matter further with his clients, the Hugoton law firm, opposing counsel or the court. As the trial judge observed, the transcript had already been ordered (Appendix C, p. A37) and the court had said everything about the merits of the case which it was going to say (Appendix C, p. A37).

The trial court filed its Memorandum of Opinion on September 15, 1972, and judgment was formally entered against the defendants on September 25, 1972. On October 5, 1972, Cornwell filed motions on behalf of the plaintiffs for certain corrections, changes and alterations in the Court's Memorandum of Opinion. These motions were not noticed for hearing or argument and, on October 25, 1972, the trial court entered an order overruling them.

The clerk's docket sheet recites that copies of the order overruling the post trial motion were "mailed to all counsel" on October 25, 1972. At the hearing on the plaintiffs' motion under Rule 4(a), the trial court found that Cornwell had not received the mailing from the clerk's office (Appendix C, p. A37).

The Court of Appeals affirmed this finding. Its opinion states simply that Cornwell "did *not* receive a copy of the trial court's order denying the motion to correct and alter judgment" (Appendix C, p. A37). The emphasis on "not" is contained in the opinion.

Cornwell did not discover that his motions had been overruled until December 8, 1972, at which time one of his associates made inquiry at the Clerk's office. Since the decision on the merits had been kept under advisement by the trial court for nearly one year, Cornwell had had no way of knowing when his post trial motions would be ruled on.

In any event, Cornwell did discover the existence of the October 25 order on December 8, more than thirty days after the judgment of the lower court was entered. A motion for an extension of time in which to file a notice of appeal was filed on behalf of the plaintiffs on December 12 and a hearing on the motion was set by the court for December 15. Cornwell filed two affidavits reciting the circumstances described above. Opposing counsel filed an affidavit alleging that he did not have "time to prepare an appropriate evidentiary substantiation for the record." The parties stipulated at the hearing that the Hugoton law firm representing the plaintiffs did receive notification of the trial court's ruling from the Clerk's office but that no communications were thereafter had by that law firm with the Wichita law firm.

The transcript of the December 15 hearing (Appendix C, pp. A35-A40), reveals that the following factors influenced the trial court's decision to give the plaintiffs additional time in which to file a notice of appeal:

1) The case was "difficult";

2) The record was "voluminous";

3) The amount in issue was of significant "magnitude";

4) The attorney responsible for filing the notice of appeal did not receive the clerk's notification of the court's ruling on his post trial motions;

5) The delay involved was "short" and not prejudicial to the defendants because the record was already prepared;

6) The judge himself was frequently inaccessible, making communications with counsel difficult;

7) Everything was prepared from the very start with the understanding that the party which did not prevail was "going to have this case reviewed."

A notice of appeal was filed by Cornwell on behalf of plaintiffs on December 21, 1972, within the extended time ordered by the trial court pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure. No cross appeal was filed to review the factual determination made by the trial court that there had been a showing of excusable neglect.

B. The Reversal of the Trial Court's Finding of "Excusable Neglect"

After the plaintiff-appellants filed their notice of appeal, but prior to the briefing of the case on its merits, the defendant-appellees filed a motion in the Court of Appeals to have the appeal dismissed on the ground that the appeal was not timely filed and that the extension of time granted by the district court was not justified under Rule 4(a) of the Federal Rules of Appellate Procedure. After deferring a final ruling on the motion until after full submission of the cases on its merits, the Court of Appeals

filed its opinion sustaining the motion to dismiss and reversing as a clear abuse of discretion the district court's finding of excusable neglect on the part of plaintiffs' counsel.

The opinion contains no discussion of the merits of the action nor any suggestion that the appellees were in any way prejudiced by the extension of time for appeal granted by the district court.

The Court of Appeals states that its action in this case evolves from its prior decisions on the subject. In the course of the discussion of these precedents in the opinion, the following statements are made:

> "A court of appeals acquires jurisdiction of an appeal only upon the filing of a timely notice of appeal and this requirement is mandatory and jurisdictional. . ." (Appendix B, pp. A28-A29).
>
> ". . . the fact that counsel of record in a criminal case who was responsible for the filing of the notice of appeal had not himself received notice from the clerk that his motion for new trial had been denied . . . was not in and of itself sufficient to make it a case of 'excusable neglect.'" (Appendix B, p. A30).
>
> ". . . Rule 77(d) charges a prospective appellant with the duty of following the progress of the action and advising himself as to when the court makes an order which he wishes to appeal." (Appendix B, p. A30).
>
> ". . . the mere fact that counsel of record did not receive notice from the clerk is not, standing alone, sufficient to support a finding of excusable neglect." (Appendix B, p. A32).
>
> "The present record does not in our view disclose circumstances that are either unique or extraordinary,

only run-of-the-mill oversight growing out of a lack of communication between co-counsel each of whom was counsel of record." (Appendix B, p. A33).

Petitioners respectfully suggest that both these pronouncements and the harsh result flowing therefrom are in direct conflict with the history of the Federal Rules of Civil and Appellate Procedure, prior pronouncements of this court and the decisions of other Courts of Appeals.

REASONS FOR GRANTING THE WRIT

I

Since the Federal Rules Have Been Amended to Permit Extensions of Appeal Time upon a Showing of Excusable Neglect, the Court of Appeals Did Not Have Jurisdiction to Dismiss the Appeal in the Absence of a Cross Appeal Challenging the Findings and Conclusions of the Trial Court under Rule 4(a).

Any federal court is empowered to consider its jurisdiction at any stage in the proceeding, but such authority refers and is limited to subject matter jurisdiction, as is expressly provided by Rule 12(h) of the Federal Rules of Civil Procedure. The sole ground for dismissal here is that the lower court abused its discretion in determining the existence of excusable neglect.

The trial court's finding of excusable neglect was made pursuant to Rule 77(d) of the Federal Rules of Civil Procedure and Rule 4(a) of the Federal Rules of Appellate Procedure. Both of such rules were promulgated as rules of court, pursuant to legislative grant repealing all inconsistent laws and authorizing the Supreme Court to adopt

rules prescribing the practice and procedure before district courts and courts of appeals. 28 U.S.C. §2072.

The rules of practice and procedure prescribed by this court for the conduct of litigation in the federal courts, including those involved here, have nothing to do with subject matter jurisdiction. Such was the conclusion reached by this Court with regard to its own rules, similarly adopted, when it extended by 101 days the prescribed time for filing a petition for writ of certiorari, and held:

> "The procedural rules adopted by the court for the orderly transaction of its business are not jurisdictional and can be relaxed by the court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States,* 398 U.S. 58, 26 L.Ed.2d 44 at 49, 90 S.Ct. 1555.

This Court, speaking through Mr. Justice Brandeis, has previously addressed itself to the necessity of appealing an order dealing with jurisdiction, other than that going to the subject matter.

> "If there were a lack of jurisdiction in the district court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee. . . But the challenge is merely of the jurisdiction of the court for the particular district. The objection is to the venue . . . This privilege not to be sued elsewhere can be waived; . . . The United States was, nevertheless, entitled to insist upon compliance with the venue provision; and its objection was properly taken below. But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost." *Peoria & P.U.R. Co. v. United States,* 263 U.S. 527, 68 L.Ed. 427 at 431.

In its opinion in this case, the Court of Appeals states that "[A] court of appeals acquires jurisdiction of an appeal only upon the filing of a timely notice of appeal and this requirement is mandatory and jurisdictional. *Lathrop* v. *Oklahoma City Housing Authority,* 438 F.2d 914 (10th Cir. 1971). . ." (Appendix B, pp. A28-A29). Does this language mean that a court of appeals always has the authority to determine whether a notice of appeal has been timely filed, regardless of whether appellant has obtained an extension based on excusable neglect and, further, regardless of whether appellee has lodged a cross appeal from the allowance of such an extension? An examination of the source of such language, *United States* v. *Robinson,* 361 U.S. 220, 4 L.Ed.2d 259, 80 S.Ct. 282, as cited and relied upon by the Tenth Circuit in *Lathrop,* supra, indicates that it arose from the application of a subsequently amended rule of criminal procedure which made absolutely no provision for an extension of time in which to file an appeal.

> "The history of Rule 45(b) shows that consideration was given to the matter of vesting a limited discretion in the courts to grant an extension of time for the taking of an appeal, but, upon further consideration, the idea was deliberately abandoned."
>
> * * *
>
> "That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision." 361 U.S. 220 at 229-30, 4 L.Ed.2d 259 at 265.

Rule 45(b) contained a provision which stated, quite simply, that ". . . the court may not enlarge . . . the period

for taking an appeal." By contrast, the trial court in this case was expressly empowered by Rule 4(a) to extend the period for taking an appeal upon a showing of excusable neglect. Since Rule 45(b) did not provide for or recognize any procedure for the extension of time for appeal on the basis of excusable neglect, the district court in *Robinson* clearly had no authority to issue such an order and it was proper for the appellee to challenge the timeliness of the filing of the notice of appeal by motion in the court of appeals. Upon the expiration of the ten-day appeal time prescribed by former Rule 45(b), both the district court and the Court of Appeals could be said to have lost jurisdiction of the subject matter.

As indicated by this Court in *Robinson*, the rule-making process has been used to provide district courts with discretionary power to provide extensions of time in which to appeal. As a result, the allowance of an extension of time for appeal (if granted within the 30-day period following the expiration of the original appeal time) is reviewable by notice of appeal as is any other final decision, but it no longer involves the jurisdictional power of either the district court or the Court of Appeals.

Professor Moore observes that courts of appeal have, without apparent investigation or consideration, erroneously assumed that a rule-prescribed time for appeal is equivalent to the former statutory time for appeal which was jurisdictional. He then points out that,

> "It seems too plain for argument that the time for appeal is no longer jurisdictional. It was jurisdictional when it was embedded in statutes creating jurisdiction. But when Congress turned over to the Supreme Court the power to prescribe procedural rules it in effect announced that it no longer intended to define jurisdiction in time. It can hardly be supposed to have

turned over to the Court the power to define the jurisdiction of federal courts." 9 Moore's Federal Practice, 204.02, p. 910.

Now that the district courts do have authority to grant extensions for appeals under the rules prescribed by this Court, the analysis put forth by Professor Moore becomes more significant than ever. Rule 4(a) findings and conclusions with which an appellee disagrees should be challenged through the channels of a formal cross appeal. The seriousness and potential harshness of any appellate action on such a matter can demand no less.

The Seventh Circuit has now apparently accepted Professor Moore's contention that the timely filing of an appeal is no longer jurisdictional. *Grantham* v. *Morgan Linen Serv., Inc.*, 426 F.2d 237, 238 (7th Cir. 1970). By the same token, the Fourth Circuit has refused to act upon a motion to dismiss an appeal filed thirty-one days after the judgment became final and has, instead, remanded the matter to the district court for a determination of whether the delay was caused by excusable neglect. 366 F.2d 773 (4th Cir. 1966).

The Court of Appeals dismissed the appeal without a transcript of the Rule 4(a) hearing. The dismissal occurred after the merits of the action had been briefed and argued at great expense to the parties. The issue of excusable neglect was not even addressed in the printed briefs. Petitioners do not suggest that the rule prescribed time for appeal should be disregarded. They merely urge that they be afforded the notice and the protection (i.e., a fully designated record and a statement of points) inherent in the formal appellate process. And, in this context, to convert a trial court's abuse of discretion into a jurisdiction failure amounts to a kind of verbal alchemy utterly inconsistent

with the letter and spirit of the rules of practice and procedure prescribed by this Court.

II

The Decision of the Court of Appeals Conflicts with the History of Rule 4(a) and the Definition of Excusable Neglect Put Forth in the Decisions of Other Courts of Appeals.

Although this Court has not yet had occasion to comment directly upon the meaning of "excusable neglect", it has consistently held that Rule 4(a) is violated if a trial court's allowance of additional time (prior to the expiration of the original appeal time) is reversed on appeal. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 282, 9 L.Ed.2d 261; *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404; *Wolfsohn* v. *Hankins*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636. The facts of the present case, in combination with the apparent determination of the Tenth Circuit to adopt a "prospective appellant" rule which is much more restrictive than that contemplated by the Advisory Committee upon revision of the rule in 1966, present strong reasons for a direct examination of "excusable neglect" in the context of Rule 4(a) by this Court.

Prior to 1966, former Rule 73(a) authorized the District Court to extend the appeal time only "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment." In 1966, former Rule 73(a) was amended and liberalized by elimination of the phrase "based on a failure of a party to learn of the entry of judgment."

The purpose of the amendment and resultant Rule 4(a) is stated by the Advisory Committee to be premised upon

the proposition that "the District Court should have the power to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result." (*Committee Note* of 1966 to amended subdivision (a) [of former Fed. R. Civ. P. 73]). The Committee further urged that such power to be extended to the District Courts "whenever failure to take a timely appeal resulted from *excusable neglect of any kind*, observing however, that 'no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice of appeal be filed.'" (9 *Moore's Federal Practice*, p. 969, ¶204.13).

This history is reviewed in some detail in *Maryland Casualty Company* v. *Conner*, 382 F.2d 13 (10th Cir. 1967) at pp. 16-17 and in *Long* v. *Emery*, 383 F.2d 392 (10th Cir. 1967) at p. 394. In *Conner* counsel for the appellant, who actually conducted the litigation, admitted receiving notice of the entry of judgment against him but still sought an extension of time (after the expiration of the original appeal time) on the ground that he had been overwhelmed with other work due, in part, to the death of his senior partner. Since it is obvious from comments made by the Advisory Committee in its notes and by members of the Committee after adoption of the 1966 amendments that being too busy does not constitute excusable neglect, the appeal in *Conner* was dismissed.

The results reached in *Conner* and in the other Tenth Circuit opinions dealing with excusable neglect have clearly been correct: *Long* v. *Emery*, (1967) 383 F.2d 392 (attorney who did not receive notice of lower court's ruling on the proper form of the journal entry of judgment could not establish excusable neglect because he did not attend the hearing at which the journal entry was finalized, even though he had been advised that the court would

"resolve" the matter at that time and knew that one of the two proposed orders would be approved at that time); *Buckley* v. *United States,* (10th Cir. 1967) 383 F.2d 611 (attorney who did not receive notice of lower court's ruling on motion for new trial but was present when the motion was overruled could not establish excusable neglect because his affidavit indicates that his failure to file the appeal was actually due to an error in the computation of his appeal time and the press of other business); *Cohen* v. *Plateau Natural Gas Company,* (10th Cir. 1962) 303 F.2d 273 (the trial court committed reversible error by granting an extension after the expiration of the original appeal time without giving notice to all adverse parties); *Lathrop* v. *Oklahoma City Housing Authority,* (10th Cir. 1971) 438 F.2d 914 (application for extension was filed 8 months after judgment became final).

In both *Long* and *Buckley* counsel did not receive notice from the Clerk but the trial courts found, in effect, that they either knew or had reason to know of the entry of judgment by other means. *Cohen* and *Lathrop* were properly disposed of on procedural grounds.

But, even as it was properly disposing of these "excusable neglect" cases, the Tenth Circuit was (by its own admission in the opinion which is the subject of this petition) establishing a basis in dicta for a radical departure from the provisions of Rule 4(a):

> "Rule 77(d), as amended, thus plainly charges the prospective appellant with the duty of following the progress of the action and advising himself when the court makes the order he wishes to protest. See Nichols-Morris Corp. v. Morris, 2 Cir., 279 F.2d 81, 83." *Long* v. *Emery,* supra, at p. 394.

(The above language is cited with approval in *Lathrop*, supra, at p. 915.)

"Under these circumstances [appellant's local counsel received clerk's notice but chief counsel did not], it is extremely doubtful whether, as a matter of law, the 'excusable neglect' contemplated by Rule 73(a) was present. See: Nichols-Morris Corporation v. Morris, 2 Cir., 279 F.2d 81." *Cohen* v. *Plateau Natural Gas Company*, supra, at p. 274.

In *Cohen* trial had taken place in Wichita, Kansas. Wichita counsel for the appellant received notice from the clerk of the entry of summary judgment in favor of defendants but appellant's chief counsel, located in New York City, did not. In its opinion in the present case, the Tenth Circuit holds that the dismissal of the appeal was "indicated" by *Cohen*.

The "prospective appellant" rule has now become a reality in the Tenth Circuit. Under the holding of the present case, an attorney responsible for the filing of a notice of appeal will henceforth be obligated to monitor the activities of the clerk's office in order to protect himself from the uncertainty of the mails or an error on the part of the Clerk. Such an arrangement surely is not contemplated by Rule 4(a).

The approach taken by other circuits and by the Advisory Committee is that excusable neglect will be found if counsel does not receive a clerk's notice *unless* counsel should have otherwise known or had reason to know of the entry of the order finalizing the judgment. This is the proper basis for prior decisions of the Tenth Circuit and for the decision of the Second Circuit in *Nichols-Morris Corporation* v. *Morris*, 279 F.2d 81 (2d Cir. 1960), which is the sole authority (besides its prior opinions) cited

by the Tenth Circuit for its adoption of the "prospective appellant" rule in this case.

In *Morris* the Clerk did not send counsel for appellant notice of the entry of judgment but, within a few days after it had been signed and filed, the "managing attorney" in appellant's law firm saw the judgment on file and, prior to the expiration of the appeal period, the attorneys for both parties actually discussed whether an appeal would be taken from the judgment. The district court refused to find that there had been excusable neglect and the Court of Appeals affirmed:

> "We cannot avoid the conclusion that the failure to act was the result either of a failure to understand the law, or of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." 279 F.2d 83.

In other words, it could not have been clearer that appellant's counsel knew of the entry of judgment well prior to the expiration of the appeal time.

The circumstances surrounding the adoption of Rule 4(a), including the notes of the Advisory Committee, clearly show that lack of notice is the cornerstone of excusable neglect. The comments of a member of the Advisory Committee, as reported in *Conner*, supra, at p. 16, indicate that the omission of the language "based on the failure of a party to learn of the entry of judgment" occurred "because experience has revealed that there are a number of other situations in which tardiness is excusable and in which it is unfair to dismiss an appeal because of late filing of the notice."

The excusable neglect being plead here by petitioners is a unique and extraordinary combination of lack of notice to Mr. Cornwell and the assumption on the part of the

Hugoton law firm that he had received the same mailing from the clerk which they received.

Cornwell was both local and chief counsel for appellants insofar as filing the notice of appeal was concerned. Contrary to the situation in *Cohen*, supra, there was no need for Cornwell to contact anyone before filing the notice of appeal. It was clear from the record that local counsel in *Cohen* did not have authority to proceed with an appeal and that he would have had good reason to contact New York counsel prior to the expiration of the 30 day period to find out what should be done. One of the primary functions of local counsel is to receive pleadings and notices and be certain that filings are made in a timely manner. See *Buckley* v. *United States*, supra, at pp. 614-15. No such function was being served by the Hugoton firm in this case and it is unreasonable and unfair to assume otherwise.

Contrary to the finding of the Court of Appeals, the delay in the filing of the notice of appeal did not involve a lack of communication between co-counsel. The identical situation was presented in *Resnick* v. *Lehigh Valley R. Co.*, (S.D.N.Y. 1951). In that case, plaintiff's trial counsel in charge of the case did not receive notice of entry of judgment until after the expiration of the time for appeal, although an attorney of record for plaintiff did receive notice of the entry of judgment. The Court held that such facts constituted a "showing of excusable neglect." The Court held that:

> "The Court is of the opinion that the plaintiff should not be deprived of an opportunity to appeal from the adverse judgment by reason of the confusion which appears to have existed between the attorney of record and the trial counsel with respect to

> the notice of entry of judgment and the expiration date for the filing of a timely appeal. Trial counsel who was in active charge of the matter states that he did not receive notice of entry of the judgment until December 27, 1950, after the time to appeal had expired, whereupon he promptly secured the order to show cause for the relief requested herein. There is no claim that the attorney of record did not receive the notice of entry of judgment, which was entered on November 1, 1950. The Court finds that upon all the facts there is a showing of excusable neglect." (11 F.R.D. at 77).

Resnick was subsequently cited with approval by the Court of Appeals for the District of Columbia in *Conway* v. *Pennsylvania Greyhound Lines, Inc.*, 243 F.2d 39 (D.C. 1957).

Petitioners cannot imagine a more fundamental principle of fairness than requiring that the attorney responsible for filing the notice of appeal, especially when he is also local counsel, actually receive notice or have independent knowledge of the finality of the judgment from which he is to appeal. The showing of counsel from other cities or states as "counsel of record" should not result in the requirement that such counsel contact their co-counsel at the place of trial every time they receive something from the clerk's office, nor would it be fair to require local counsel to poll the other counsel of record periodically to see if they have received something which he did not receive.

There has been no showing that the delay in filing the notice of appeal in any way prejudiced appellees. It is evident from the record, however, that the dismissal

of the appeal after this complex and significant matter had been submitted to the Court of Appeals on the merits was deeply prejudicial to appellants. They spent the time and money necessary to receive a review of the case on the merits but, at the last minute, such review was denied to them.

The decision of the Court of Appeals is wholly inconsistent with the decisions of this Court cited above. Nor can the result here be reconciled with decisions of other circuits, as in *Torockio* v. *Chamberlain Mfg. Co.*, 456 F.2d 1084 (3rd Cir. 1972); *United States* v. *Wade*, 467 F.2d 1226 (8th Cir. 1972); *Dugan* v. *Missouri Neon & Plastic Advertising Company*, 472 F.2d 944 (8th Cir. 1973); *United States* v. *Mills*, 430 F.2d 526 (8th Cir. 1970); and *Lieberman* v. *Gulf Oil Corporation*, 315 F.2d 403 (2d Cir. 1963). The foregoing cases give effect to the admonition of Congress that a Court should give judgment without regard to errors or defects which do not affect the substantial rights of the parties. 28 U.S.C.A. §2111. They comply with the expressed purpose of Rule 1, Fed. R. Civ. P. that procedural devices should be construed to secure the just, speedy and inexpensive determinations of every action.

CONCLUSION

Petitioners pray that the writ be granted, the appeal reinstated and the case remanded to the Court of Appeals for disposition on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Consolidated Cases Nos. W-4242, W-4243, W-4244, W-4245, W-4246, W-4247, W-4333 and W-4334

THEODORE R. GOOCH, et al.,
Plaintiffs,

vs.

SKELLY OIL COMPANY, et al.,
Defendants.

MEMORANDUM OF OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed September 15, 1972)

These are civil actions by certain landowners against lessee-producers to cancel leases heretofore entered into for failure of lessee-producers to carry out the express or implied terms of such leases, and/or for damages actual and punitive resulting from such failure.

The parties, unless otherwise named, will be referred to as follows:

The plaintiffs in each of the cases referred to in the caption are owners of the mineral interests, and except where specifically named, will be referred to as "Landowners". When specifically named Theodore R. Gooch will be referred to as "T. R. Gooch"; the interest of L. D. Gooch, who died October 19, 1971, is now owned by Irene G. Gooch Doktor, T. R. Gooch, J. Logan Gooch, L. D. Gooch, Jr., and Florence Nix, will be referred to as "L. D. Gooch". The Florence Nix interest will be referred to as "Nix". Della Lynde Haworth and C. C. Haworth will be referred to as "Haworth". The Federal Land Bank of Wichita was named as a defendant in Case No. W-4242 and Case No. W-4245 and has been aligned by the Court as a plaintiff and will be referred to as "Bank".

The defendants in each of the cases are the owners of oil and gas leasehold rights, and except where specifically named, will be referred to as "lessee-producers". Where specifically named the Skelly Oil Company will

be referred to as "Skelly"; Texaco, Inc. as "Texaco"; Cities Service Oil Company as "Cities"; Sun Oil Company as "Sun"; Sinclair Oil and Gas Company as "Sinclair"; Columbian Fuel Company as "Columbian"; and Atlantic Richfield Company as "Atlantic".

The eight cases were consolidated for discovery and for trial. A jury was waived and the cases were tried to the Court. Jurisdiction of the Court in each of the cases is admitted and found to exist by the virtue of the diversity of the citizenship of the parties and of a jurisdictional amount.

The ownership of the minerals and of the oil and gas leasehold rights together with landowners claims are set out on a case by case basis. The number of the case is used to identify the parties as shown in the captions.

CASE NO. W-4242 (W-1/2 Section 8, T 35, R 35 W) OWNERSHIP

MINERALS—1/2, T. R. Gooch; 1/2 Bank. (The original lease was entered into in 1940 and covered 320 acres in W-1/2 of Section 8, T 35 S, R 35 W).

OIL AND GAS LEASEHOLD RIGHTS—Texaco, Skelly and Columbian. Following assignments made in 1968, 1969 and 1970, the ownership of the oil and gas leasehold rights as of October 1, 1970 was as follows: As to the N-1/2 of the NW-1/4 and SW-1/4 of Section 8-35S-35W, the Chester Sand Formation—Texaco; Chase Group and Morrow Foundation—Texaco, Skelly and Cities; all other formations—Texaco and Cities; as to the S-1/2 NW-1/4 of Section 8-35S-35W, the Chester Sand Formation—Texaco and Skelly; all other formations—Texaco, Skelly and Cities.

CLAIM—T. R. Gooch and Bank seek cancellation of leasehold rights except for 80-acre tract surrounding each producing Chester well.

They thus ask that the lease as to the SW-1/4 of 8-35S-35W be cancelled, and except for producing formations, Chase and Morrow Gas be cancelled.

CASE NO. W-4243 (NE-1/4 Section 8, T 35 S, R 35 W)

OWNERSHIP

MINERALS—1/2, T. R. Gooch and Olive Gooch; 1/2 Mobil. (Original lease entered into in 1938 covered 160 acres in NE-1/4 of Section 8).

OIL AND GAS LEASEHOLD RIGHTS—Texaco, Skelly and Columbian. Following assignments made in 1968, 1969 and 1970, the ownership of the oil and gas leasehold rights as of October 1, 1970 was as follows: As to the Chester Sand Formation—Texaco; Chase Group and Morrow Formation—Texaco, Skelly and Cities; all other formations—Texaco and Cities.

CLAIM—T. R. Gooch claims 1/2 of 1/8 interest be cancelled as to all formations except Chase and Morrow Gas, and attorneys fees. They also claim oil drainage of 16,410 gross barrels.

CASE NO. W-4244 (SW-1/4 Section 31, T 34 S, R 35 W)

OWNERSHIP

MINERALS—Full, T. R. Gooch. (Original lease entered into in 1940 covered 160 acres in SW-1/4 of Section 31, 34 S).

OIL AND GAS LEASEHOLD RIGHTS—Oil only—Sun; Gas only—Sun, 25%; Cities, 75%.

On January 15, 1969, Texaco purchased the oil rights only from Sun and thereafter and continuously to the present time said oil rights only have been owned by

Texaco. The gas rights only now and at all times since 1963 are owned by Sun and Cities.

The SW-1/4 of said Section 31 is pooled with the balance of said Section 31 to form 640 acre gas unit for the production of gas. There is a Chase Group (Hugoton) gas well located thereon in the Morrow Gas Formation which are located thereon in the center of the section. There are two gas wells completed in the Morrow Gas Formation which are located in the SE-1/4 of the SW-1/4 of Section 31 and the SE-1/4 of the SE-1/4 of Section 31. All three wells are owned by the defendants Cities and Sun. Neither Texaco nor Skelly have ever owned any interest in the gas and oil leases covering the SW-1/4 of Section 31, except that on January 15, 1969 Texaco acquired from Sun the oil leasehold rights only and Texaco has since that time owned the oil rights only.

CLAIM—T. R. Gooch seeks cancellation of all except SE-1/4 of SW-1/4 of Section 31, 34 S, R 35 W, and for drainage up to August 1, 1971 to the SE-1/4 of 36-34S-36W, $40,936 and $7,632 future drainage. Plaintiffs also contend that drainage occurred from SE-1/4 of Section 31 (No. W-4244) to NW-1/4 of Section 6 (No. W-4334) in the amount of $51,240 and for future drainage of $28,896. T. R. Gooch claims punitive damages in amount of $50,000 and attorney fees.

CASE NO. W-4245 (NE-1/4 Section 7, T 35 S, R 35 W)

OWNERSHIP

MINERALS—1/2, T. R. Gooch; 1/2, Bank (Original lease entered into in 1940 covered 160 acres in NE-1/4 of Section 7).

OIL AND GAS LEASEHOLD RIGHTS—Texaco, Skelly and Columbian. The ownership of the oil and

gas leasehold rights as of October 1, 1970 were as follows: Texaco, Skelly and Cities (into which Columbian has been merged).

CLAIM—T. R. Gooch and Bank seek cancellation of all of NE-1/4 of Section 7 except SE-1/4 of NE-1/4 of Section 7. They also claim oil drainage loss to SE-1/4 of Section 6 from NE-1/4 of Section 7 (No. W-4245) in the sum of $11,744 and future drainage $684. They claim punitive damages in amount of $25,000 and attorneys fees.

CASE NO. W-4246 (S-1/2 Section 7, T 35 S, R 35 W)

OWNERSHIP

MINERALS—Full, L. D. Gooch and Irene Gooch Doktor, jointly. Original lease dated in 1940 covers SW-1/4 and SE-1/4 (S-1/2) of Section 7 (320 acres).

OIL AND GAS LEASEHOLD RIGHTS—Texaco, Skelly and Columbian. The ownership of the oil and gas leasehold rights as of October 1, 1970 were as follows: Texaco, Skelly and Cities (into which Columbian has been merged).

CLAIM—L. D. Gooch and Irene Gooch Doktor seek cancellation of the lease except as to Morrow Gas Formation. They also claim a loss for drainage from S-1/2 of Section 7 (No. W-4246) to NE-1/4 of Section 7 (No. W-4245) in the amount of $42,120. They claim punitive damages in the amount of $50,000 and attorneys fees.

CASE NO. W-4247 (NE-1/4 Section 6, T 35 S, R 35 W)

OWNERSHIP

MINERALS—Full, T. R. Gooch. (Original lease entered into in 1940, covering 160 acres in NE-1/4 of Section 6).

OIL AND GAS LEASEHOLD RIGHTS—Texaco, Skelly and Columbian. The ownership of the oil and gas leasehold rights as of October 1, 1970 were as follows: As to Chester Sand Formation—Texaco; Chase Group and Morrow Formation—Texaco, Skelly and Cities; all other formations—Texaco and Cities.

CLAIM—T. R. Gooch claims Morrow gas drainage from NE-1/4 of Section 6 to NW-1/4 of Section 6 (No. W-4334) of $109,904 and future drainage of $61,976. He claims punitive damages in the amount of $250,000 and attorneys fees.

CASE NO. W-4333 (SW-1/4 Section 6, T 35 S, R 35 W)

OWNERSHIP

MINERALS—Full, Nix. (Original lease entered into in 1938 covered 160 acres in SW-1/4 of Section 6).

OIL AND GAS LEASEHOLD RIGHTS—Oil and casinghead gas rights, Sinclair; gas rights only, Texaco, Skelly and Columbian. The ownership of the oil and gas leasehold rights as of October 1, 1970 were as follows: Gas rights only, Texaco, Skelly and Cities; oil and casinghead gas rights, Atlantic.

CLAIM—Nix claims Morrow gas drainage from Section 6 (No. W-4334; W-4333; W-4247) and SE-1/4 of Section 6 to S-1/2 of Section 31 (No. W-4244); and SE-1/4 of Section 31, in the amount of $56,936 and future loss for gas drainage of $93,976 or alternatively cancellation of Morrow Gas rights (No. W-4334). She claims punitive damages of $50,000 and attorneys fees.

CASE NO. W-4334 (NW-1/4 Section y, T 35 S, R 35 W)

OWNERSHIP

MINERALS—Full, Haworth. (Original lease entered into in 1938 covered 160 acres in Section 6).

OIL AND GAS LEASEHOLD RIGHTS—Oil and casinghead gas only, Sinclair; gas rights only, Texaco, Skelly and Columbian. The ownership of the oil and gas leasehold rights as of October 1, 1970 were as follows: Gas rights only, Texaco, Skelly and Cities; oil and casinghead gas rights from surface to 6740 , Texaco; oil and casinghead gas rights below 6740', Atlantic.

CLAIM--Hawerth claims damage for drainage of Morrow gas to SW-1/4 of Section 31 (No. W-4244) and to SE-1/4 of Section 31; also claims a loss with No. W-4333 of the amounts set forth in claims under No. W-4333. They also now seek cancellation. Plaintiffs seek punitive damages in the amount of $50,000.

FINDINGS OF FACT

We adopt the facts set forth in the Pre-Trial Order as approved by the parties in all cases.

In addition, we adopt as stipulations of fact the request for admission of facts by lessee producers and agreed to by landowners.

We will refer to only those stipulations and admissions. hereafter as they clarify our views.

Some general observations are important to put these controversies in proper perspective.

The area with which we are involved here is known as the Gooch Pool in Stevens County, Kansas. [See Joint Exhibit II attached hereto.] The Gooch Pool is a part of the Hugoton Area or field which has been and still is the subject of Interpleader actions,[1] pending in this Court after appellate review and affirmed in part, and remanded with directions.

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1. *Northern Natural Gas Company* v. *Grounds*, 292 F. Supp. 619 (1968) 441 F. 2d 704 (1971) CA 10.

The leases which conveyed the oil and gas to various lessees are standard in nature. They were entered into from 1938 to 1941. The leases covered 160 to 320 acres in Sections 8, 7, 6, and 31 as described, supra.

As we found in the Northern Natural cases (see Footnote 1) the Kansas Corporation Commission had authorized the unitization for gas production. This unitization was generally authorized by the basic leases. The unitization provided for drilling gas wells in each section here involved. These unitized gas wells were drilled to the Hugoton or Permian Formation. At the time of trial, gas was being produced from each section here involved.

With this background we turn to the leases here involved. These leases provide that they will remain in effect so long as oil or gas is produced.

While the lessee-producers, defendants, had made some studies concerning the productive nature of the leasehold interest they owned, it was not until 1962 that they commenced exploratory drilling to other formations. Lessee-producers had entered into an agreement in 1962 with a pipe line company which provided in part:

> (a) The old sales contract would be amended to provide that Northern would pay 11¢ per Mcf. for all gas produced from the Hugoton.
>
> (b) Texaco, Skelly and Cities would agree to drill a well on the lands covered by the old gas sales contract, to a depth sufficient to test the Mississippi (Chester) Formation.
>
> (c) A new Agreement would be entered into for higher prices for gas produced from formations below the Hugoton.

As a result of the chance of greater profits the lessee-producers commenced a test well on SE-1/4 of NW-1/4 of Section 8 (W-4242).

This well showed two sections of the Morrow Sand Formation that were gas producing, but, as far as these actions are concerned, Lessee-Producers Texaco encountered some oil in the Chester Sand Formation.

Lessee-Producers were commercially enthused by this oil production and in 1963 filed an application with the State Corporation Commission. Both the landowners and lessee-producers sought and lessee-producers received permission to drill and produce oil on an 80-acre spacing program.

On November 26, 1963, the Commission granted lessee-producers' application. The Commission does not have authority to require that wells be drilled, in a particular location. Its only authority is to prescribe the amount of oil allowed to be produced (allowable). If an area is spaced on 80 acres and if the well is drilled in the location designated by the Commission, it is given a higher allowable. If the well is not drilled on the designated location, the allowable is smaller. The order issued by the Commission granted the requested higher allowable, on 80-acre spacing, if the wells were drilled in the approximate center of the Northwest and Southeast 40 acres of each quarter section.

The problems began to develop between the landowners and lessee-producers after the Commission ruling. Landowners considered that the 80-acre allowable required lessee-producers to drill an 80-acre tract without regard to the economic factors involved. This is not an unusual concept especially when the lessee-producers' interests were required to pay the entire cost of drilling,

but to receive generally a 7/8s interest in all oil and gas produced.

The lessee-producers being corporations organized for profit let economic considerations prevail and started a drilling program on what had been denominated as a "step-out development."

The schedule of wells drilled in this Gooch area of the Hugoton pool in Stevens County is shown by defendants' Exhibit D, which the parties have stipulated to and is attached as an Appendix to these findings.

The step-out development of drilling wells convinced the defendants that their 80-acre program was not going to be economically sound. While plaintiffs would not have to pay for drilling of wells on an 80-acre tract, if any oil or gas was produced the lessor involved would participate in the recovery. The lessee-producer, on the other hand, would have to recover his loss of the "dry hole" from producing wells or from other earnings or capital.

By the middle of 1966 the defendants had drilled fourteen wells, nine of which were dry as to oil. As far as the plaintiffs here are concerned, eight wells were drilled from October, 1963 to the middle of 1966. Of these wells, four were dry as to oil.

At the time of the drilling of the Chester Oil Well as a dry hole in the SE-1/4 SW-1/4 of Section 31 on May 12, 1966, the lessee producers had drilled and completed in the Gooch-Chester Oil Pool 14 wells and only 4 of the 14 were productive. The rest were dry holes in the Chester Oil Formation. [Deft. Ex. D.] The lessee-producers have the actual costs of drilling the Chester Oil Well tests. The lowest cost of drilling any dry Chester well is $48,866.78 and the highest cost of drilling a Chester Well

as a dry hole was $62,202.94. The cost of drilling and completing a successful producer ranged from $68,000 to $138,500. [Deft. Ex. D.] Dually completed wells cost $111,323.96 to $132,559. [Deft. Ex. D.]

On about June 14, 1966 the lessee-producers commenced efforts to unitize on a fieldwide basis the Gooch-Mississippi Chester Oil Pool.

A record of negotiations having to do with the attempts of the lessee-producers to form a fieldwide unit for said pool is in evidence as Exhibit B. Their efforts to negotiate a Plan of Unitization for the Gooch-Chester Oil Pool resulted in an agreed upon Plan of Unitization and operation. All of the landowners lands were included in area covered by such Plan of Unitization. [Deft. Ex. C.] The efforts to unitize on a fieldwide basis the Gooch-Chester Pool lasted approximately two years and ten months. The first meeting for the purpose of discussing the joint effort to unitize was called on June 14, 1966 and was held on June 30, 1966.

The unitization effort lasted until April, 1969 when all signatures (31% of landowners) which had been obtained ratifying the Plan of Unitization were returned to the signers thereof.

During that period of time there were approximately ten meetings, four of which were either with landowners or their counsel. There were numerous engineering meetings and at least three separate engineering assignments. Between the meetings the engineers and the lessee-producers studied various phases of the proposed plan. There were three separate phases in connection with the unitization efforts. The first phase lasted from June 30, 1966 until spring of 1967. At that time the lessee-producers committee first started to put the unit together.

At that time there were five wells and there was an Engineering Committee Report and the lessee-producers had negotiated a participation formula which was not the final one used and they were beginning to develop a Plan of Unitization for the pool, when it came to light that Shell was drilling their Roehr Well (SE-1/4 SE-1/4 Section 36, Township 34 South, Range 36 West). The Unitization efforts were suspended pending completion of the Roehr well. The Roehr well was completed as a producer of oil in the Chester Formation on April 20, 1967. The cost to Shell was $138,500 to complete the Roehr well. Shell then drilled the Carlisle #2 Well (SE-1/4 SW-1/4 Section 36) as a producer of oil in the Chester Formation, completing same on August 10, 1967. [Deft. Ex. D.] There had been drilled in the interim between the Stalcup "E" #1 Well and the Carlisle #2 Well a well drilled by Ikman Brothers denominated as the Gooch #1 Well (NE-1/4 SW-1/4 of Section 6). The well was completed as a dry hole in the Chester Formation on August 18, 1966.

In about April of 1967 Texaco received the only demand to drill which has been made by any of the landowners in any of these cases. That demand was for Texaco to drill what is now the Della Haworth #2 Well which was completed by Texaco at a location in the NW-1/4 NW-1/4 of Section 6 as a producer of oil in the Chester Formation. In the connection with the drilling of this well the Haworth's have admitted that there has been no substantial drainage of Chester Oil from the NW-1/4 of said Section 6 and that they do not assert any claim in this connection.

On June 1, 1966 Skelly in a letter to Texaco suggested that the lessee-producers of the Gooch Pool discuss the possibility of respacing the Gooch-Chester Pool on 160-acres. [Deft. Ex. B.] In about May of 1967 they decided

to seek 160-acre spacing and upon the completion of the Carlisle Well (SE-1/4 SW-1/4 of Section 6) by Shell on August 8, 1967, another assignment was made to the Engineering Committee to extend the Engineering Report and to update it and essentially to start over at that time. Representatives of the lessee-producers had two meetings with representatives of the landowners. The lessee-producers negotiated a formula in December 1967 which is in the Plan of Unitization, [Deft. Ex. A] and it was the basis for the division of equity. Representatives of the landowners were advised and furnished copies of the minutes of the meetings of the Organization Committee for the Gooch-Chester Sand Unit Plan. [Pltf. Ex. 54.]

On June 10, 1967, Texaco filed with the Corporation Commission of Kansas an application for an order redefining the limits for the Gooch-Mississippi Oil Pool by adding thereto and deleting therefrom certain acreage, and also amending the Basic Proration Order for said pool by changing the well spacing from 80 acres to 160 acres, all in Stevens County, Kansas. [Pltf. Ex. 111, page 4.] This application was not proceeded upon for quite a while until the lessee-producers could see if the pool could be unitized. The application for the changing of the well spacing from 80-acres to 160-acres was first set for hearing on June 9, 1967 and was continued until July 20, October 19, December 21, 1967 and February 15, and April 18, 1968 and several other times. [Pltf. Ex. 111, page 5.] Both the proponents of the spacing the lessee-producers and the landowners who were represented in that proceeding at all times by their present counsel of record, at different times wanted more time to try to work this thing out. There were about eleven continuances and the lessee-producers made an effort to try to get the pool unitized. [Pltf. Ex. 111, page 5.] Since the lessee-producers could not get the pool unitized, the spacing hearing was finally

held on January 23 and 24, 1969. The landowners through their legal representatives, opposed the application. [Pltf. Ex. 111.]

In June of 1968 the landowners retained a petroleum engineering expert, Mr. Mahoney, as their consultant. At that time the lessee-producers were discussing unitization of the Gooch-Pool with the landowners. The purpose of the unitization of the field was so that a pressure maintenance program for secondary recovery of oil could be operated. In Mr. Mahoney's opinion, the injection of the water and the pressure maintenance program would have accomplished a greater recovery of oil.

In Mr. Mahoney's opinion with the situation facing the operators in drilling the dry holes and the five producers it was reasonable and prudent for the lessee-producers to unitize for secondary recovery of the Chester Formation. In the event they had been able to accomplish the unitization, a greater ultimate recovery of oil would have resulted. That ultimate recovery of oil would have inured to the benefit of the landowners without cost to them, and would have recovered additional ultimate oil in Mr. Mahoney's opinion from the pressure maintenance between 900,000 and 1,200,000 barrels of oil. That would have, at $3 per barrel, been about $3 million of oil of which the royalty owners would get one-eighth.

It was necessary during the time unitization was being considered and negotiations being made with the landowners to get certain percentages of the landowners to agree before the Unitization Plan could be effectuated. [K.S.A. 55-1301, et seq. requires a 75% royalty owner approval.] In Mr. Mahoney's opinion, during the time the unit was being negotiated, a prudent operator would not have gone in and drilled additional development wells.

The unit plan had been developed and submitted and Mr. Mahoney reviewed that plan. He reviewed the participation factors and the proposed flood plan. He prepared a chart showing what he thought was a fair participation by each lease and each royalty owner in the plan to be performed. He had slightly different percentages in some instances for certain leases different from what the plan called for. In some instances he gave certain royalty owners a greater percentage and others a lesser percentage than Texaco's proposal would have given them. However, in the negotiations of the unit the landowners agreed to appoint a common agent who would agree to accept all the royalty and distribute it in a manner that the landowners agreed.

It was the further testimony of Mr. Mahoney, that another advantage of the Plan of Unitization was that leases on which it would not be economic to drill a well, but under which there is some oil, would be able to participate and get a part of the secondary production. For example, on the S-1/2 of Section 7, L. D. Gooch, (Case No. W-4246) owned the minerals and it would not have been economic to drill a Chester well there. Yet, under the Plan of Unitization, L. D. Gooch, because there was some oil underneath his land, would have been permitted to share in the secondary recovery project. The same would be true in other similar instances. Mr. Mahoney recommended that the landowners in these cases agree upon and accept the Plan of Unitization.

Mr. Mahoney was present at a conference between the representatives of the landowner and of the lessee-producers in Wichita in November, 1968. The landowners at the meeting demanded the payment of a total of approximately $45,000 cash, plus a 1/16 overriding royalty in addition to their 1/8 royalty on primary production and an overriding royalty of 1/8 in addition to the 1/8 royalty

on secondary production before they would approve the Plan of Unitization. Landowners at the meeting in November 1968 stated to lessee-producers that unless these payments and overrides were made these lawsuits which they were then preparing would be filed.

It costs substantially more for an operator to recover secondary oil by water flood than by primary production. The additional cost to the lessee-producers would have been a couple hundred thousand dollars.

Both parties have produced "experts". Landowners' expert explained to the Court that their Plan of Unitization was the best and that lessee-producers had not drilled as they should. The lessee-producers' expert found their Plan of Unitization the best; that they had used good economic sense in their exploratory and drilling operations.

We have concluded that the lessee-producers' contentions are more acceptable than landowners'. Thus, landowners have failed to establish their claim of "Fraudulent Drainage"; of uncompensated drainage and for a breach of implied covenant to develop and prevent drainage.

The basic oil and gas lease covering the lands described in each one of these cases have been in effect for over thirty years. These leases do not "speak" in terms of formations but of exploring for and producing oil and gas by the lessee-producers. They are valid leases and constitute a license, and an incorporal hereditament, or profit a prendre. [*Northern Natural Gas Co.* v. *Grounds,* 441 F. 2d 704 (CA 10, 1971)].

While these leases can define a surface area, the area of gas or oil formations underground are not necessarily limited to such area. Indeed, in these cases, it is admitted that the "pools" cannot be so defined. Thus, the only way to define the "pools" of gas or oil is by exploratory action —the best proof of which is the actual drilling of wells.

The lessee-producers must exercise reasonable diligence in doing what is required of an operator of ordinary prudence.

The leases here involved provide that they shall remain in effect so long as oil and gas is produced. There is and has been gas produced under each of these leases by virtue of the unitization agreement, covering Permian gas.

Except for the requirement placed upon lessee-producers by the equitable concept of "implied covenants" under the terms of a lease the production of gas in one formation is sufficient to keep the leases in effect.

The "implied covenant" principal has long been established in Kansas. Its application under the circumstances of this case is well stated in *Renner* v. *Monsanto Chemical Company*, 187 Kan. 158, 354 P. 2d 326 (1960). The Kansas Court said,

> "While early cases of this court indicate that the implied covenant to protect against drainage was intertwined and indistinguishable from the covenant to fully develop (*Betterment Co.* v. *Blaes*, 75 Kan. 69, 88 P. 555; *Howerton* v. *Gas Co., supra; Culbertson* v. *Cement Co., supra*), it is now well established that the duty to protect against drainage is an independent covenant (*Summers, op. cit., supra*, § 399, p. 568; *Merrill, op. cit., supra*, § 94, p. 234.)
>
> Generally speaking, the rule of the implied covenants to drill additional wells after discovery and to protect the premises against drainage by wells on adjoining leases is this: under the former, when oil in paying quantities becomes apparent and the number of wells to be drilled on the lease is not specified, there is an implied obligation that the lessee continue de-

velopment of the property and put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both the lessor and the lessee (*Howerton* v. *Gas Co., supra; Brown* v. *Oil Co.*, 114 Kan. 166, 217 P. 286; *Myers* v. *Shell Petroleum Corp.*, 153 Kan. 287, 110 P. 2d 810; *Fischer* v. *Magnolia Petroleum Co.*, 156 Kan. 367, 133 P. 2d 95; *Berry* v. *Wondra, supra; Temple* v. *Continental Oil Co., supra*).

Under the latter, because of the fluidity of oil and the likelihood of its being withdrawn from the leased premises by the operation of wells on adjoining lands, a rigid duty is imposed upon the lessee to protect the premises from substantial drainage by drilling a sufficient number of wells at points the same distance from the lease boundary lines as are the wells on adjoining lands. (*Gillet* v. *Investment Co.*, 111 Kan. 755, 207 P. 843; *Culbertson* v. *Cement Co., supra; Howerton* v. *Gas Co., supra; Harris* v. *Morris Plan Co.*, 144 Kan. 501, 61 P. 2d 901; *Myers* v. *Shell Petroleum Corp., supra; Summers, op. cit., supra*, § 399, p. 568; *Merrill, op. cit., supra*, § 94, p. 234). Whether a lessee has performed his duties under the implied covenants is a question of fact. In the absence of a controlling stipulation, neither the lessor nor the lessee is the sole arbiter of the extent to which, or the diligence with which, the operations shall proceed. The standard by which both are bound is what an experienced operator of ordinary prudence would do under the same or similar circumstances, having due regard for the interests of both (*Greenwood* v. *Texas-Interstate P. L. Co.*, 143 Kan. 686, 56 P. 2d 431; *Harris* v. *Morris Plan Co., supra; Myers* v. *Shell Petroleum Corp., supra; Fischer* v. *Magnolia Petroleum Co., supra*, Syl. ¶ 4; *Temple* v. *Continental Oil Co., supra.*)."

The fundamental responsibility to promote development and prevent delay under an oil and gas lease is upon the lessee. *The Kansas courts have followed the general* principles announced in *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801. In *Fischer* v. *Magnolia Petroleum Co., supra,* the Kansas Court quoted from *Brewster,*

> " 'The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable . . . . There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith.
>
> "But, while this is so, no breach can occur save the absence of such diligence is both certain and substantial in view of the actual circumstances at the time as distinguished from mere expectations on the part of the lessor and conjecture on the part of mining enthusiasts. The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required . . . *Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required.*" (p. 814.)' "

Likewise, in *Myers* v. *Shell Petroleum Corp.*, 153 Kan. 287, 110 P. 2d 81, the Court recognized the limitation of the "implied covenant" rule that it applies to both the lessor or lessee and that the lessee is not required to engage in exploration or development if it is unprofitable to such lessee.

The prudent operator rule was described in the *Fischer* case in this manner.

> "It has generally been recognized that in determining whether there is prudent development under the lease there are various pertinent factors to be considered—all the facts and circumstances which would affect the reasonableness of an ordinarily prudent operator's position in connection with development of the particular tract involved. (2 Summers, Oil and Gas, Perm. Ed. 377, 278; 2 Thornton Oil and Gas, pp. 836, 837, and footnote 76). In *Brewster* v. *Lanyon Zinc Co., supra,* the circuit court of appeals said:
>
> 'Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business.' (p. 814.)
>
> Among other such economic facts to be considered have been listed 'cost of drilling, equipment and operation of wells, . . . cost of transportation, cost of storage, prevailing price . . . general market conditions as

influenced by supply and demand or by regulation of production through governmental agencies.' (2 Summers, Oil and Gas, Perm. ed., pp. 377, 378).

It was on these standards of duty required of the lessees that the rule that the lessors must show by substantial evidence that lessees had not acted as prudent operators to carry out the "implied covenants" to explore, develop and produce oil and gas under the lease involved. (See *Renner* and *Fischer, supra,* and cases cited therein. It goes without saying that if the lessor has established a prima facie case of failure of lessee to carry out his duty the burden shifts to him to excuse his conduct. (See *Crocker* v. *Humble Oil and Refining Co.*, 419 P. 2d 265).

The fundamental responsibility for the development of an oil and gas lease under the leases in issue, is with the lessee-producer and not the landowner or lessor. This responsibility of lessee-producer requires the study and development of a Unitization Plan, if warranted or required to obtain an equitable recovery of oil or gas or both from formations underlying the leases.

The Plan of the lessee-producers to unitize the Gooch Pool in Stevens County, Kansas, Exhibit C, is not unreasonable or inequitable to the landowners. Such unitization plan constituted a reasonable means by which lessee-producers could continue to carry out their duty to develop and produce oil and gas and protect the landowners against drainage, if any.

Under the facts and law of this case the landowners have not sustained their burden and are not entitled to cancellation of the leases in the cases here involved nor have they established a claim for damages against lessee-producers for negligent or fraudulent drainage.

Prevailing counsel shall prepare, circulate and submit an Order and Judgment in accordance with the views expressed herein. Each party shall bear their own costs.

At Wichita, Kansas this 15th day of September, 1972.

(Signed) Wesley E. Brown
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1095 through 73-1097
(Consolidated)

THEODORE R. GOOCH, et al.,
Plaintiffs-Appellants,

v.

SKELLY OIL COMPANY, a corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
(D. C. No. W-4334)

Submitted: January 22, 1974
(Filed March 25, 1974)

Robert T. Cornwell (Bernard E. Nordling, Leland E. Nordling, Dale M. Stucky and Richard I. Stephenson, on the brief), for Plaintiffs-Appellants.

Gerald Sawatzky (Elmer W. Adams, Sam Riggs, Jr., Paul D. Fielding, Jr., Sam C. Oliver; and of Counsel, Foulston, Siefkin, Powers & Eberhardt, on the brief), for Defendants-Appellees.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

The first matter to be resolved is whether we have jurisdiction to hear these consolidated appeals on their merits. We conclude that we do not, and the appeals must therefor be dismissed.

The appellees filed in this court a motion to dismiss based on the alleged failure of the appellants to file a timely notice of appeal in the trial court. We denied this motion without prejudice to the right of the appellees to renew the motion in their brief and at the time of oral argument on the merits. This the appellees have done. We are now convinced that the motion to dismiss is well taken and that these appeals must be dismissed.

Gooch and others brought an action against Skelly Oil Company and others seeking cancellation of certain oil and gas leases as well as damages for what was described as negligent and fraudulent oil and gas drainage by the defendants. Trial was to the court, sitting without a jury, and on September 25, 1972, the trial court entered formal judgment in favor of the defendants. The trial court generally found that the plaintiffs had failed to sustain their burden of proof and were entitled to no relief.

On October 5, 1972, the plaintiffs filed a motion to correct and alter the aforesaid judgment. This motion was not set for hearing and the trial court on October 25, 1972, more or less sua sponte, entered an order denying the motion to correct and alter judgment. As indicated, there was no court hearing, as such, on the motion to correct and alter judgment. However, the record of the trial court shows that copies of the order denying the motion to correct and alter judgment were mailed to all counsel on October 25, 1972.

Gooch and the other plaintiffs were represented by two attorneys, each being an attorney of record for the

plaintiffs. One attorney was located in Hugoton, Kansas, and it is agreed that a day or so after October 25, 1972, he did in fact receive a copy of the trial court's order denying the motion to correct and alter judgment. The second attorney, who was also "of record" as representing the plaintiffs was located in Wichita, Kansas, and he did *not* receive a copy of the trial court's order denying the motion to correct and alter judgment.

On December 12, 1972, the plaintiffs filed a motion for an order extending the time by thirty days within which a notice of appeal could be filed. In support of this motion was the affidavit of the Wichita attorney. In that affidavit it was represented that the affiant, i.e., the Wichita attorney, had not received any notice from the clerk and had not otherwise learned of the October 25 order till December 8, 1972. On that date, according to the affidavit, inquiry was made as to why the trial court had not ruled on the motion to correct and alter judgment and on that occasion the clerk of the court stated that the motion had in fact been denied on October 25, 1972. In this affidavit the Wichita attorney was said to be the "principal" attorney for the plaintiffs.

This motion to extend time was set for hearing on December 15, 1972, at which time the trial court, over objection from the defendants, granted the motion and found, in effect, if not in so many words, "excusable neglect." Plaintiffs then filed their notices of appeal on December 21, 1972.

It is the appellees' basic position that the trial court's finding of excusable neglect is not supported by the record and that, on the contrary, the record shows no excusable neglect, as a matter of law. The extension of time within which to file the notice of appeal having been improperly granted, appellees argue that the present appeal must be

dismissed for the failure of the plaintiffs to file their notice of appeal within thirty days immediately subsequent to October 25, 1972, the date when the motion to correct and alter judgment was denied, as required by Fed.R. App.P. 4(a). *See also* 28 U.S.C. § 2107. We agree with the appellees.

At the outset, we recognize that a trial court's finding as to the presence or absence of "excusable neglect" as that term is used in Fed.R.App.P. 4 should not be overturned by us on appeal unless there has been a clear abuse of discretion. Buckley v. United States, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968). However, in the instant case, we conclude that the record simply does not support a finding of excusable neglect, which is of course essential to any extension of time within which to file a notice of appeal. In so finding the trial court did thus abuse its discretion. In support of our resolution of the matter, we need not go outside our circuit for authorities, as we have on numerous prior occasions indicated that the thirty-day period for filing a notice of appeal in a civil case and the ten-day period in a criminal proceeding are not to be extended except on a real showing of excusable neglect. Let us examine the applicable rule and the Tenth Circuit cases bearing on this matter.

According to Fed.R.App.P. 4, a notice of appeal in a civil case shall be filed with the clerk of the district court within thirty days of the date of the entry of the judgment or order appealed from, and that rule further provides that where a motion to amend judgment has been filed pursuant to Fed.R.Civ.P. 52(b), the thirty-day period commences to run when the motion to amend is either granted or denied. A court of appeals acquires jurisdiction of an appeal only upon the filing of a timely

notice of appeal and this requirement is mandatory and jurisdictional. Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir. 1971), *cert. denied*, 404 U.S. 840 (1971), and Maryland Casualty Company v. Conner, 382 F.2d 13 (10th Cir. 1967).

This same rule, i.e., Fed.R.App.P. 4, also provides that the district court may extend the time for filing the notice of appeal for a period not to exceed thirty days "upon a showing of excusable neglect," with the proviso that the extension may be granted either before or after the expiration of the initial thirty-day period. The term "excusable neglect" is not defined in the rule, and we have heretofore stated that whether neglect is excusable depends on the facts of the case at hand and that the question should be determined on the basis of the "common-sense meaning of the two simple words applied to the facts which are developed." Buckley v. United States, *supra*.

In *Buckley*, which was a criminal case where the defendant had been sentenced to five years' imprisonment and fined $5,000, the defendants' counsel was two days late in filing a notice of appeal. The Government then moved to dismiss the untimely notice of appeal; whereupon the defendant filed a motion to extend the time for filing notice of appeal. In support of this latter motion, one of defendant's counsel filed an affidavit in which he stated that he had not received a notice from the clerk that his motion for a new trial had been denied and that because of the press of other business he had not checked into the matter before the ten-day period had expired. The trial court held in *Buckley* that this was an insufficient showing of excusable neglect, and we affirmed on appeal. In affirming, we stated that counsel's claim of neglect caused by his waiting for a notice from the clerk which never came "is not a basis for a plea of excusable

neglect." So, in *Buckley,* the fact that counsel of record in a criminal case who was responsible for the filing of the notice of appeal had not himself received notice from the clerk that his motion for new trial had been denied did not obligate the trial court to find excusable neglect and on appeal we indeed indicated such fact was not in and of itself sufficient to make out a case of "excusable neglect."[1]

In Lathrop v. Oklahoma City Housing Authority, *supra,* the clerk apparently failed to mail counsel of record a copy of the trial court's order denying timely filed post-trial motions. After the thirty-day period for filing a notice of appeal had expired, counsel first became aware that his post-trial motion had been denied, and he promptly sought to file, out of time, a notice of appeal. In dismissing the appeal because of the untimely filing of the notice of appeal, we noted that Fed.R.Civ.P. 77(d) specifically provides that lack of notice of the entry by the clerk does not affect the time to appeal or relieve a party for failure to appeal within the time allowed, except as permitted by Fed.R.App.P. 4(a). In that case, we then went on to observe that Rule 77(d) charges a prospective appellant with the duty of following the progress of the action and advising himself as to when the court makes an order which he wishes to appeal.

A similar situation was involved in Long v. Emery, 383 F.2d 392 (10th Cir. 1967). There, counsel for the would-be appellant did not receive notice from the clerk that the post-trial motions had been denied, though he did know that a hearing was to be held on the post-trial motions. The trial court there refused to grant an

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1. Buckley was concerned with Fed.R.Crim.P. 37(a)(2), which now appears, in substance, as Fed.R.App.P. 4(b).

extension of time to file the notice of appeal and we affirmed on appeal. In affirming, we stated that the fact that counsel did not receive notice from the clerk that post-trial motions had been denied was but one of many factors to be considered in determining whether there has been excusable neglect. In this connection, we noted that the Advisory Committee on Rules had stated that the time for appeal need not be extended merely because the clerk's notice was not sent or received. We also observed that Rule 77(d), as amended, charges a prospective appellant with the duty to keep himself apprised as to the status of his case.

Perhaps Cohen v. Plateau Natural Gas Company, 303 F.2d 273 (10th Cir. 1962), comes closest to the facts of the present case. There, "local" counsel received notice from the clerk of the date of judgment. However, the would-be appellant's "chief" counsel in New York City did not receive such notice. Chief counsel, after the initial thirty days had expired, filed a motion to extend the time for filing of a notice of appeal and urged as grounds therefor the fact that he, as chief counsel, had not received notice of the entry of judgment. The trial court granted this motion for an extension of time, ex parte. On appeal, we reversed on the grounds that under the applicable rule the hearing on the motion to extend the time for the filing of a notice of appeal, having been filed beyond the thirty-day period, could only be held on notice, and not ex parte. In so holding, we added, by way of dictum, that "it is extremely doubtful whether, as a matter of law, the 'excusable neglect' contemplated by Rule 73(a) was present."[2] So, in the instant case, as in *Cohen*, "prin-

2. *Cohen* was concerned with Fed.R.Civ.P. 73(a), which now appears, in substance, as Fed.R.App.P. 4(a).

cipal" or "chief" counsel did not receive notice from the clerk, though other counsel of record did. And in *Cohen* we indicated that "chief" counsel had not made out a case of excusable neglect simply because he himself had not received notice from the clerk.

Application of these principles to the present factual situation leads inescapably to the conclusion that the trial court erred in granting Gooch's motion to extend the time within which he could file his notice of appeal. From the cases above referred to, we learn that even where the *only* counsel of record in a case did not receive notice from the clerk of action taken by the trial court, such fact did not obligate a trial court to find excusable neglect. Additionally, there is at least a suggestion in such cases as *Buckley* and *Long* that the mere fact that counsel of record did not receive notice from the clerk is not, standing alone, sufficient to support a finding of excusable neglect.

Be that as it may, the instant case is different in that it is admitted that one out of two counsel of record did receive notice that the trial court had denied Gooch's motion to correct and alter judgment, which in our view weakens even further a claim of excusable neglect. The argument that the Wichita attorney was "principal" counsel and that he did not receive notice from the clerk is not persuasive. Indeed, we believe our resolution of the present matter was forecast by our decision in *Cohen*, where "local" counsel received notice, but "chief" counsel did not. In *Cohen*, we indicated that the fact that "chief" counsel had not received notice from the clerk did not, as a matter of law, make out a case of excusable neglect. Our indication in *Cohen* becomes our holding in the present case.

In sum, the record does not support a finding of excusable neglect. The time for taking an appeal should not be extended in the absence of circumstances that are "unique or extraordinary." Maryland Casualty Company v. Conner, *supra*. The present record does not in our view disclose circumstances that are either unique or extraordinary, only run-of-the-mill oversight growing out of a lack of communication between co-counsel, each of whom was counsel of record.

Appeal dismissed.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

Consolidated Cases Nos. W-4242, W-4243, W-4244, W-4245, W-4246, W-4247, W-4333 and W-4334

THEODORE R. GOOCH, et al.,
Plaintiffs,

vs.

SKELLY OIL COMPANY, et al.,
Defendants.

TRANSCRIPT OF HEARING ON MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL ON DECEMBER 15, 1972

Appearances:

HON. WESLEY E. BROWN, Chief Judge, Presiding.

Mr. Robert T. Cornwell of Fleeson, Gooing, Coulson & Kitch, 1600 Vickers-KSB&T Building, P. O. Box 997, Wichita, Kansas 67202 appearing for Plaintiffs.

Mr. Gerald Sawatzky of Foulston-Siefkin-Powers & Eberhardt, 600 Fourth National Bank Building, Wichita, Kansas 67202 appearing for Defendants.

[2] BE IT REMEMBERED, that on this 15th day of December, A.D., 1972, the above matter coming on for hearing on motion for extension of time to file notice

of appeal before the Honorable Wesley E. Brown, Chief Judge of the United States District Court for the District of Kansas, the parties appearing in person and/or by counsel as hereinbefore set forth, the following proceedings are had:

THE COURT: Call your cases, Mr. Clerk.

THE CLERK: Case No. W-4242, and others, Theodore R. Gooch, et al., versus Skelly Oil Company, et al., Defendants.

MR. CORNWELL: May it please the Court:

THE COURT: Yes. Do you have an affidavit that you didn't receive the notice?

MR. CORNWELL: Yes, sir.

THE COURT: Do you know of any reason why he shouldn't be given an opportunity to appeal my findings, Mr. Sawatzky, really?

I think this is the kind of case that appropriately can have a review. It is a difficult case. You know how voluminous it was. I would feel very badly if my findings in a case of this kind couldn't be reviewed.

I think in a case of this magnitude it is almost a matter of right. I had problems with it, as you know. [3] I went through it. There were days when I had all these exhibits in front of me trying to do something and I just think he ought to have the right to appeal.

MR. SAWATZKY: Well, Your Honor, the only thing which would give him a right to appeal, since the initial 30 days has gone by, is a showing of excusable neglect and a finding by the Court of excusable neglect.

It is our position that the order, final order, overruling the post trial motion was received by Mr. Nordling who attended the trial of the case and is the active attorney

for the plaintiffs in that area and that since the notice went to him that this itself precludes a finding of excusable neglect.

I filed an affidavit saying that I didn't have time to prepare an appropriate evidentiary substantiation for the record.

THE COURT: Well, it comes from the clerk's office. Mr. Cornwell says he didn't receive it, my decision overruling the motion for new trial. I had said everything I could say at that time.

I am going to make a finding of excusable neglect. I am not even going to say "excusable neglect". I am going to make a finding that one of counsel who has the burden and who carried the onerous didn't receive the notice when he thought he should and you are going to have to [4] defend me up in the Circuit Court of Appeals.

MR. SAWATZKY: In order to make our position clear and to make a proper record I would also like to enter our objection on the ground that the applicable rule requires that appropriate notice be given by the Court of a hearing on this situation and that such notice was not given.

THE COURT: In connection with that, my notice to have you come up here at this time, there is a limit to what we can do.

In this case you already have the transcript. It has been ordered. All the exhibits are here. You have had them. You have both had ample opportunity to present the matter to me.

Another thing about this: if this had been a case of some person who filed an in forma pauperis affidavit and had been permitted to appeal they would have listened

to any application any place to let that fellow get before them so they could listen to his kind of case. In a case of this kind where people have tried hard and where through some inadvertence you don't get it, you may be up in front of me sometime when you haven't got it and you think the Court has not really performed according to what he should in his findings. I hope that is the only reason. I have had others where they didn't think I was impartial, so to speak, which I didn't like very well, but I think they ought to have the [5] right. I want you to set up all your objections that you have. You can raise them before the Circuit. I think they ought to have the right to have me reviewed. In this case the record alone in this case would warrant an issue.

My findings of course were almost negative findings in this case, to the effect that they didn't overcome the high burden on them and I still think that is the law or I wouldn't have decided it the way I did. I don't care which one of you prevail, any of you. All I want to do is to be sure, the best within my competence, that I am right, but everybody else gets a chance to have me looked at. I think these people out there ought to have a chance to have me looked at. And the delay isn't sufficient to make it bad. It is only a short time. I don't know what it is. It isn't going to delay it being up there before them because everything is ready, really, except the points. And I think you can afford to be magnanimous, Mr. Sawatzky.

MR. SAWATZKY: Our position I think is set forth in the affidavit which I just filed.

THE COURT: And I am accepting that. I am not accusing you of making an inappropriate affidavit. All I am saying is that I think it ought to be reviewed if there is any way, and you all have trouble getting to

me. You realize, of course, that while this case was going on I had another big case going on in which counsel are sitting [6] right out here right now and this is one of our older cases.

So prepare a journal entry setting forth your objections and that I have, in effect, found that there could be a basis for whatever it is, an inadvertence or excusable neglect, if that is the term I have to use. I don't like some of these terms. I just think everybody gets too busy but save your objections so you can raise it on appeal. It is just another thing to have me looked at.

MR. SAWATZKY: All right.

THE COURT: But I will tell you, I think you ought to know that part of my feeling in these—I see all of these cases—and some of them I get sent back to me and rightfully so, in our system. There isn't anything wrong with me getting reversed. I just do the best I can with what I have got. I wish sometimes I was infallible but I will leave "infallibility" to other people. I claim none. But I think it will be unsuccessful.

MR. SAWATZKY: We do too, Your Honor, but it is going to cost a lot of money to process it.

THE COURT: Well, it may cost a little money to process it but not as much as it would as if you were going to have to order a new transcript and all of these things that are already prepared in this case. Very frankly I would look at it a good deal differently if that might happen but here everything was prepared from the very start [7] in this case with a view that one or the other of you were going to have this case reviewed. You know it and I know it.

And I just, as I say, I think I was right. Maybe I am like the old Justice of the Peace after he had been

reversed and the Supreme Court affirmed him, he said, "I don't care what they said, I still think I am right." It may be on that basis. We are in a very contentious world today. He gets to take it up and have them look at it.

MR. CORNWELL: Thank you, Judge.

MR. SAWATZKY: All right.

[8] CERTIFICATE

I, Ned C. King, a Certified Shorthand Reporter in and for the State of Kansas and Official Reporter for the United States District Court for the District of Kansas, do hereby certify that I was present and reported in shorthand at the hearing on motion for extension of time to file notice of appeal held on December 15th, A.D. 1972, before the Honorable Wesley E. Brown, Judge of the United States District Court for the District of Kansas, in re: THEODORE R. GOOCH, et al., Plaintiffs, versus SKELLY OIL COMPANY, et al., Defendants, Consolidated Cases Nos. W-4242, W-4243, W-4244, W-4245, W-4246, W-4247, W-4333 and W-4334 in said Court.

I further certify that I have since transcribed or had transcribed under my direction and supervision my notes so taken as aforesaid in said case on said date.

WITNESS my hand on this the 21st day of December, 1972.

/s/ Ned C. King
Ned C. King, C. S. R.
Official Reporter
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In the Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
SEP 30 1974
MICHAEL RODAK, JR., CLERK

No. 74-221

THEODORE R. GOOCH, et al.,
Petitioners,

vs.

SKELLY OIL COMPANY, a corporation, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Opinions Below 1

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

Argument—

I. Respondents Properly Moved to Dismiss the Appeals, and Were Not Required to File a Separate Notice of Appeal from the Order Extending the Time for Appeal, As Permitted by All Courts Passing on the Question 6

II. The Court of Appeals Was Correct in Holding That the Undisputed Record Failed to Establish "Excusable Neglect" 9

Conclusion 11

Table of Authorities

CASES

Buckley v. *United States*, (C.C.A., 10th, 1967), 382 F.2d 611, cert. den. 390 U.S. 997, 88 S.Ct. 1202, 20 L.Ed.2d 97 (1968) 7

City of Gainesville v. *Brown-Crummer Investment Co.*, 72 L.Ed. 54 7

Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 9 L.Ed.2d 261 10

In the Matter Pertaining to W. H. "Pat" O'Bryan, (C.C.A., 10th, 1968), 399 F.2d 916, cert. den. 89 S.Ct. 1014, 394 U.S. 906, 22 L.Ed.2d 217, rehrg. den. 89 S.Ct. 1456, 394 U.S. 994, 22 L.Ed.2d 772 7

Levisa Stone Corp. v. *Elkhorn Stone Co.*, (C.C.A., 6th, 1969), 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104 7

Resnick v. *Lehigh Valley R. Co.*, (S.D.N.Y. 1951), 11 F.R.D. 76 8

TEXTS AND STATUTES

29 Am. Jur.2d, Evidence, § 194, p. 247 10

Annotation, 9 L.Ed.2d 1088, at 1093 10

9 Moore's Federal Practice, Secs. 204.13(4), 204.02, 204.01 ..... 7, 8

Rule 4(a), Federal Rules of Appellate Procedure 6, 8, 10

28 USC § 2107 (63 Stat. 104) 2

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 493 F.2d 366. The Journal Entry of Judgment reversed by that decision is reproduced on pages 88-89 of the printed Appendix filed in the Court of Appeals. (Document No. 7 of the partial transcript of record). Petitioners have reproduced the district court opinion and judgment on the merits in Appendix B to their Petition.

QUESTIONS PRESENTED

1. May the propriety of an appeal, taken under an order of the district court extending the time to file a notice of appeal an additional 30 days based on alleged "excusable neglect", be attacked by a motion to dismiss the appeal?

2. Was the record insufficient to establish "excusable neglect" in filing a timely appeal, when the clerk of the district court mailed copies of the final order to the offices of all counsel of record, when petitioners' general attorneys received it promptly, and when petitioners' trial attorney, who alleged he did not receive it, officed in Wichita, Kansas, wherein the district court was located?

STATUTES INVOLVED

Petitioners have not cited 28 USC § 2107 (63 Stat. 104), which reads as follows:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days

after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11."

STATEMENT OF THE CASE

Petitioners are substantial landowners from whose lands have been produced oil and gas in prolific quantities for many years, from multiple geological formations. (Petition, pp. A2-A12). When respondents sought to prevent declining oil production by means of a unitized secondary recovery project, petitioners demanded large cash payments and additional royalties above those provided in their leases, as a condition to their approval and consent to unitization, such consent being required by local law. (Petition, pp. A12-A17). Respondents declined, and petitioners then filed these suits seeking cancellation of the leases and damages for alleged failure to further develop and for alleged drainage.

After extensive discovery and trial, the district court found, upon substantial, if not undisputed, evidence, that petitioners failed in their burden of proof, that defendants had not failed to prudently develop; that no drainage occurred, and hence there existed no right of cancellation or damages. (Petition, p. A22).

Petitioners timely moved to alter the judgment on October 5, 1972. On October 25, 1972, the district court overruled the motion. (C.A. App. 82).[1] On the same date, the Clerk sent a copy of the order to all counsel of record, including petitioners' Wichita, Kansas, counsel, and to petitioners' Hugoton, Kansas, counsel. (Petitioners resided in or near Hugoton, Kansas, and their Hugoton counsel were their general attorneys.) (C.A. App. 89).

On December 12, 1972, 48 days later, petitioners filed a motion to extend the time for appeal an additional 30 days under FRAP 4(a), based on alleged "excusable neglect". The sole factual basis alleged as a basis for extending the time was that, although petitioners' Hugoton, Kansas, counsel promptly received the order overruling the motion to alter the judgment, their Wichita, Kansas, counsel had not received a copy of the final order.[2] (C.A. App. 83-85).

Nothing in the record negates the presumption that petitioners themselves received prompt notice of the final order, because of the admitted mailing to their counsel. Nothing in the record supports petitioners' present immaterial assertions, and inferences that Wichita, Kansas, counsel was solely responsible, pursuant to prior agreement, after receiving notice of the final order, to file a timely notice of appeal.

The present suits, in fact, were filed in state court in Hugoton, Kansas. Defendants removed to federal court in Wichita, Kansas. At the trial of the cases, Hugoton counsel actively assisted petitioners' Wichita counsel during the trial.

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1. Printed Appendix in the Court of Appeals. (Document No. 7).

2. The affidavits filed do not negate that the order was received by lay employees of Wichita counsel.

On December 15, 1972, respondents' Wichita counsel, having been given telephone notice on December 12 or 13, of a "hearing", appeared in court on petitioners' motion for additional time based on excusable neglect. At the time of hearing, the only evidence of record was Mr. Cornwell's affidavit (petitioners' Wichita counsel) stating that he had not personally received notice of the final order, and that other lawyers in his firm had not received it (but not stating that the law firm staff had not received it). (C.A. App. 83-85). Petitioners' Wichita counsel stipulated that Hugoton, Kansas, counsel had timely received the notice; and made no assertion that petitioners themselves had not been timely notified. (C.A. App. 83-89).

Respondents' counsel filed an affidavit reciting he had not had sufficient time to investigate the facts. (C.A. App. 85).

The "hearing" before the trial court consisted of the district court announcing its decision before any argument, or any due consideration of respondents' lack of opportunity to investigate the facts. The district court promptly announced he would not even find the required "excusable neglect", merely that petitioners' Wichita counsel had not received notice of the final order, even though his co-counsel had received it, and that, therefore, he wanted petitioners to have the right to have his rulings on the merits reviewed on appeal. (Petition, pp. A36-A37).

ARGUMENT

I. Respondents Properly Moved to Dismiss the Appeals, and Were Not Required to File a Separate Notice of Appeal from the Order Extending the Time for Appeal, As Permitted by All Courts Passing on the Question.

As was typical in proceedings below, petitioners' assertions in this Court are inaccurate and incomplete. The Court below, in dismissing the appeals before it, had no alternative in applying the clear terms of Rule 4(a) of the Federal Rules of Appellate Procedure, as enunciated and approved by this Court, and other appellate courts.

Petitioners misstate the record in several material particulars:

(1) Petitioners state, p. 15, that the "Court of Appeals dismissed the appeal without a transcript of the rule 4(a) hearing." This statement is in error, for that transcript was attached to respondents' motion to dismiss the appeals, and was also included in the Record on Appeal. (See Index to Record on Appeal, Vol. 4; Document No. 1).

(2) Petitioners erroneously state, p. 15, that "The issue of excusable neglect was not even addressed in the printed briefs." In fact, respondents filed a printed brief devoted exclusively to this issue, and, after having been overruled with the right to renew when briefed on the merits, again renewed the motion to dismiss in their printed brief on the merits. (Documents 2-6, 8-9).

One thing that indisputably appears from the Record is simply this: The district court granted the motion for additional time based on its desire to allow an appeal to

be taken, regardless of the extent of the neglect to file it on time. The Court of Appeals, on the other hand, gave extensive and considered judgment to the actual record in determining that the neglect to file the Notice of Appeal on time was not "excusable neglect".

Petitioners' initial contention that respondents were required to file a notice of cross-appeal, or a separate appeal, from the order permitting the additional appeal time, is frivolous and devoid of merit. As noted by Professor Moore:

> "If the district court grants an extension of time for appeal, the order granting the extension may be challenged in the court of appeals by a motion to dismiss the appeal." (*9 Moore's Federal Practice*, Sec. 204.13(4)).

There is not a case holding to the contrary.[3]

The reason is simple. The filing of a timely notice of appeal has universally been considered to be jurisdictional. Any court must examine its own jurisdiction, even without suggestion from the parties. While Professor Moore recognizes this universal rule, *9 Moore's Federal*

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3. All cases considering the question have arisen on motions to dismiss, rather than on separate cross-appeals. E.g., *City of Gainesville* v. *Brown-Crummer Investment Co.*, 72 L.Ed. 54; *Levisa Stone Corp.* v. *Elkhorn Stone Co.*, (C.C.A., 6th, 1969), 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104; *In the Matter Pertaining to W. H. "Pat" O'Bryan*, (C.C.A., 10th, 1968), 399 F.2d 916, cert. den. 89 S.Ct. 1014, 394 U.S. 906, 22 L.Ed.2d 217, rehrg. den. 89 S.Ct. 1456, 394 U.S. 994, 22 L.Ed.2d 772; *Buckley* v. *United States*, (C.C.A., 10th, 1967), 382 F.2d 611, cert. den. 390 U.S. 997, 88 S.Ct. 1202, 20 L.Ed.2d 97 (1968).

Petitioners' unsupported contention could lead to a legal nightmare: "A" moves for additional time to appeal for excusable neglect; the court grants the motion; "B" moves for additional time to appeal from that order based on excusable neglect; the court grants the motion; "A" must appeal from it; *ad infinitum*.

Practice, § 204.02, p. 908[4], he elsewhere indicates that the present rules are not "jurisdictional", in the sense that Congress has placed limitations on the power of this Court to establish rules relating to the taking of appeals. *9 Moore's Federal Practice*, p. 910. But talking about jurisdictional power is a mere mincing of words. Whether by congressional statute, or by court rule authorized by congressional statute, the time limitations for filing appeals from district courts have universally been strictly enforced. As stated by Professor Moore himself:

> "The provisions of Rule 4, the successor to earlier rules fixing the time for appeal from district courts to courts of appeals, ought to be regarded as mandatory in the highest degree. The finality of judgments is a blessing that is worth a high price." (*9 Moore's Federal Practice*, Sec. 204.01, p. 910).

Not a single case has been cited by petitioners, and none exists, which is in conflict with the decision below. All cases which bear upon this point are consistent, as they are logical, in carrying out the meaning of Rule 4(a).[5]

No rational basis exists for requiring respondents to file separate notices of appeal from an order pertaining to the petitioners' right of appeal. For petitioners' appeals carry with themselves the infirmities inherent in them. Whether described as jurisdictional, or a matter of power of the court under a binding rule, the time limitations

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4. "So many hundreds of cases support the proposition that a Court of Appeals has no jurisdiction to hear an untimely appeal that it is too late to undermine the proposition by mere history and logic. * * *"

5. The early district court case, cited by petitioners, *Resnick v. Lehigh Valley R. Co.*, (S.D.N.Y. 1951), 11 F.R.D. 76 is factually dissimilar on its face.

and the conditions attached thereto, if not fulfilled, render those appeals invalid and ineffective. These considerations, we suggest, are among those leading all courts heretofore to acknowledge the logical, pragmatic procedure of challenging an untimely appeal by a motion to dismiss.

In addition to these considerations, we may also suggest there is no sound logic which suggests the contrary conclusion. Here, all of the record was available to the Court of Appeals. There was no rational reason why additional notices of appeal should clutter the record. When the motions to dismiss were filed in the court of appeals, all parties had the right, which they exercised, to bring up for review all pertinent portions of the Record.

II. The Court of Appeals Was Correct in Holding That the Undisputed Record Failed to Establish "Excusable Neglect".

The Court of Appeals' holding of ordinary neglect, not "excusable neglect" is required by the record. One of petitioners' counsel—indeed, their general counsel—had full and timely notice of the final adverse order. There is no fact of record to support petitioners' present immaterial assertions that their Wichita counsel had been authorized or instructed to appeal upon entry of a final order.

Petitioners' Hugoton, Kansas, counsel, who admittedly received prompt notice of the final adverse order, were not merely "local" counsel. They were the regular, general attorneys for their clients, who resided nearby. Nothing of record shows either that petitioners did not know of the final order, nor that they determined within 30 days after the order to take an appeal. Clearly, notice to counsel

is notice to his client. Annotation, 9 L.Ed.2d 1088, at 1093.

Moreover, the procedure adopted by petitioners in seeking additional time to appeal was calculated to prevent the disclosure of all facts pertinent to the issue of excusable neglect. Hugoton general counsel failed to appear at the district court hearing on December 15, 1972, as did the petitioners themselves. Petitioners did not make available their Wichita counsel's mail clerk who presumptively received the final adverse order on behalf of Wichita counsel for petitioners. (29 *Am. Jur.2d, Evidence,* § 194, p. 247). After actively assisting in the trial on the merits, petitioners' Hugoton counsel suddenly disappeared from the scene in all proceedings, wherein the jurisdictional question was involved.

Upon this record, we suggest the Court of Appeals had no alternative but to dismiss the appeals. Accepting petitioners' contentions upon the facts of record would only open the door to flagrant abuses of the purpose of Rule 4(a).[6]

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6. The present case differs from *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 9 L.Ed.2d 261. In that decision, petitioners had filed their motion to extend the time for appeal within the initial 30 day period, and justifiably relied on the district court order extending the time. Otherwise, petitioners could have filed a notice of appeal within the initial 30 days.

CONCLUSION

Petitioners fail to present any sound reason for reviewing the judgment below. Their contentions are unsound, and are, moreover factually unsupported by the record here presented.

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REPLY BRIEF OF PETITIONERS

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INDEX

I. Respondents' Brief Demonstrates the Importance of Granting the Writ 1

II. The Writ Should Be Granted Because the Opinion of the Court of Appeals Creates Substantial Uncertainty Concerning the Proper Application of Rule 4(a) and Rule 77(d) 4

Authorities

Expeditions Unlimited Aquatic Ent., Inc. v. *Smithsonian Inst.*, 500 F.2d 808 (D.C.Cir. 1974) 3-4

9 *Moore's Federal Practice*, 204.02, p. 910 4

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REPLY BRIEF OF PETITIONERS

I.

Respondents' Brief Demonstrates the Importance of Granting the Writ.

The respondents attempt to buttress the decision of the Court of Appeals by asserting that Hugoton counsel actually played a principal role in the litigation (Brief in Opposition, p. 9). They do not pretend to support such assertions with any references to the record. To further confuse the matter, the respondents then make the gratuitous comment that the hearing held before the trial court was somehow "calculated" by the petitioners to "prevent the disclosure of all facts pertinent to the issue of excusable neglect" (Brief in Opposition, p. 10). As respondents well know, the proper remedy for such

an alleged shortcoming would obviously be a new hearing—something which they have not requested and do not want because the facts involved could only be brought into sharper focus as a result.

As a general rule, factual findings which are not appealed from cannot be disturbed on appeal. And, even if appellate review of such findings is properly obtained, a determination that such findings are not supported by the record should normally be withheld if the subject matter with which they are concerned lies peculiarly within the knowledge of the trial court. Thus, for example, the trial court in this case was intimately familiar with the roles played in the litigation by petitioners' counsel (i.e., that Wichita counsel was responsible for the conduct of all phases of the litigation, including the prosecution of the appeal) and with the absence of any prejudice whatever to the respondents as the result of the delay in the filing of the notice of appeal (i.e., since both sides had prepared the record from the beginning with the knowledge that there would be an appeal).

There must be a "showing of excusable neglect" before the time for filing a notice of appeal can be extended by the district court under Rule 4(a) of the Federal Rules of Civil Procedure. The determination of whether there has or has not been excusable neglect is based upon findings of fact. As is stated by the Court of Appeals in its opinion in this case, such a determination "depends on the facts of the case at hand. . ." (Appendix B, p. A29).

The review of the trial court's findings by means of a motion to dismiss instead of a cross-appeal has served only to complicate the resolution of the issue of excusable neglect on appeal. Working without the assistance of a

formal appeal when examining the record, the Court of Appeals has reached three unqualified and far-reaching conclusions which cast great doubt upon both the procedure to be followed and the definition to be applied when extensions of time are sought on the basis of excusable neglect:

1) that the filing of a notice of appeal within twenty (20) days is "jurisdictional and mandatory" (Appendix B, pp. A28-29), even though Rule 4(a) expressly states that a notice filed within sixty (60) days is timely, if the delay is due to excusable neglect;

2) that no appeal need be taken from a trial court's order extending the time for appeal, based upon a determination of such excusable neglect, because an erroneous finding of fact or an erroneous exercise of discretion by the trial court deprives federal appellate courts of "jurisdiction" in such instances;

3) that a "prospective appellant" has the "duty of following the progress of the action and advising himself as to when the Court makes an order which he wishes to appeal" (Appendix B, p. A30), even though all cases cited in the opinion and by the respondents, as well as the notes of the advisory committee, clearly establish that a "prospective appellant" is entitled to await notice from the clerk unless he already has reason to know of the entry of the order or judgment which starts the appeal time running. (See the recent case of *Expeditions Unlimited Aquatic Ent., Inc.* v. *Smithsonian Inst.*, 500 F.2d 808 (D.C. Cir. 1974), where a judgment was vacated and reentered ten (10) months after it had originally been

entered in order to permit a timely appeal because neither party had been notified of the entry of the judgment by the clerk, although both parties had "periodically discussed whether there had been a decision on the motion in [the] case." 500 F.2d 809).

It is apparent from the transcript of the hearing in which excusable neglect was found that the trial court was basing its determination upon facts (i.e., the role played by Wichita counsel and the awareness of all participants that there would be an appeal) well known to it and counsel but not presented as evidence in the hearing itself. In the interest of fairness, the respondents should have been required to state from the outset whether they were seeking a new hearing (i.e., to present more evidence) and which findings of fact, if any, were not supported by the evidence. They should have been required to specify the portions of the record supporting their contention that Hugoton counsel did not play a secondary role in the litigation, and the petitioners should then have been given the opportunity to include those portions of the record supporting the findings of fact to which the respondents objected. The respondents, in short, should have been required to file a cross-appeal.

II.

The Writ Should Be Granted Because the Opinion of the Court of Appeals Creates Substantial Uncertainty Concerning the Proper Application of Rule 4(a) and Rule 77(d).

Respondents would avoid the consequences of Professor Moore's well documented conclusion that "the time for appeal is no longer jurisdictional", 9 *Moore's Federal Practice*, 204.2, p. 910, by arguing that, "as a matter of

power of the court under a binding rule, the time limitations and the conditions attached thereto, if not fulfilled, render those appeals invalid and ineffective" (Brief in Opposition, pp. 8-9). The only basis offered by the respondents for such a wide-sweeping conclusion is the unsupported assertion made in the preceding sentence that ". . . petitioners' appeals carry with themselves the infirmities inherent in them."

To put it simply, the respondents are arguing that all appellants who receive extensions of time to file their notices of appeal must always be prepared to justify their presence in the Court of Appeals (or this Court, for that matter) by showing that the delay in the filing of the appeal was caused by excusable neglect, even though no appeal is taken from the determination of excusable neglect. Instead of being protected by the requirement that abuse of discretion by the trial court be shown, such appellants wind up having to prove, once again, that the neglect involved was excusable—otherwise, their appeals will be "invalid and ineffective".

The justification given by respondents for their reliance upon a motion to dismiss to challenge the determination of excusable neglect has only one parallel in modern federal practice—the authority and duty of all federal courts to investigate their jurisdiction over the subject matter regardless of the stage of the proceedings. Such is not even the case with regard to issues such as personal jurisdiction and venue, review of which is waived by the objecting party if no appeal is taken.

The respondents' erroneous approach to the enforcement of rules of practice promulgated by this Court may explain the origin of the "prospective appellant" rule which has been adopted by a circuit court for the first time

in this case. Petitioners seriously doubt that the statement made by this Court in *United States* v. *Robinson*, 361 U.S. 220, 4 L.Ed.2d 259, 80 S.Ct. 282, that the requirement of filing a timely notice of appeal was "mandatory and jurisdictional", was intended to influence the manner in which district courts should exercise their discretionary power to permit extensions of time upon the basis of excusable neglect—when no such provision was then in existence. Now that there is a provision which permits an extension of the appeal time from thirty (30) to sixty (60) days on a showing of excusable neglect, the requirement that appeals be filed within thirty (30) days after the judgment becomes final is obviously no longer "jurisdictional" or "mandatory".

The manner in which the rules of this Court are applied to achieve orderly and efficient appellate review is a matter of policy and not a matter of power or jurisdiction. Practicing lawyers and litigants need to know whether (1) they must now monitor the clerk's office on a daily basis in order to "advise" themselves "as to when the Court makes an order which [they wish] to appeal" and (2) whether appellate review of a determination of excusable neglect must be preceded by a notice of appeal, as must the review of all other final orders based upon findings of fact.

Petitioners respectfully suggest that any exemption of the determination of excusable neglect from the requirements of a cross-appeal would actually result in the less efficient utilization of an appellate court's time than would be the case if the requirements were met. This case provides an excellent example. The Court of Appeals actually reviewed the determination of excusable neglect twice—both before and after the case was briefed on its merits. If a cross-appeal had been utilized, review of the deter-

mination of excusable neglect could have been assigned to the summary docket, where it might have been disposed of prior to any needless examination of the case on its merits.

Respectfully submitted,

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